



OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

December 31, 2015

To: Public Defender Commission Strategic Planning Committee

From: Harry Freebourn, Administrative Director

RE: Information for the Task Force on Public Defender Operations

KEY DATES:

Next Task Force Meeting: February 1, 2016

Information for draft review by the Commission and agency personnel: December 31, 2015

Information ready for final review by the Commission and agency personnel: January 10, 2016

Commission meets via phone between January 10 and January 20.

Materials to be submitted to Task Force staff by January 22.

LEADERSHIP:

The Strategic Planning Committee (chaired by Bonnie Olson) has the lead and will use all Commission members to supplement its membership. In other words – it will lead the committee of the whole.

TASKS:

- 1. Prepare a 10-year forecast for the agency that contains key operating and financial assumptions.**

[Cover memo](#) and [worksheet](#)

- 2. Provide an update on the CRM project.**

Over the past few years, we have worked diligently to put together an online billing system to assist the Office of the State Public Defender in our endeavors to pay our vendors quickly and fairly. We were able to implement the new system in several regions beginning in July, 2015. As of the end of November, 2015 all contract attorneys in all regions are now using the new online system. We believe it will take several months to work out any system issues related to implementation.

We have a meeting scheduled for early January, 2016 to begin discussions related to enhancements to the CRM system. There are two phases we have identified that will benefit the Agency and our operations. The first will include enhancements to show real-time hours worked on a particular case during the review process. These enhancements will also show how many total days the case has been open. There are also enhancements which will aid in making the system more user friendly and will provide additional accounting tools for both the vendors entering their time, and also those reviewing the claims. The second phase will allow us to expand the online billing system to all other vendors, including mental health providers, transcriptionists, investigators, and expert witnesses. Following completion of the

second phase of enhancements, we will be able to use the online system for several other processes including the pre-approval process, wherein attorneys (both full-time employees and contract attorneys) request approval to obtain the services of contract mental health providers or investigators.

We plan to begin work on both phases of enhancements at the beginning of March, 2016. The first phase should take approximately one month to complete. The second phase should take approximately three months to complete. The timeline is not set in stone as it requires reviewing, revising, and approving internal OPD policies.

OPD has identified many benefits of the online billing system. First, it has been positive in many regards to move to a paperless system. By doing this, the Regional Deputy Public Defenders and the Contract Manager and Conflict Coordinator, all have the ability to approve bills remotely anywhere they have internet access. This should reduce the amount of time it takes to pay bills, and reduce the opportunity for agency input error. The agency no longer needs to rely on the mail system to ensure that central office receives the paper claims. Additionally, the online system has provided managers with an easily navigated way to access prior month's claims to review the work of our vendors, which in turn has benefitted OPD in management of the contractor work force.

The benefits of implementing the online billing system will continue to be varied and positive. In one year, we would like to see all of the enhancements completed. At the time of completion, we anticipate that we would be in a place where we could begin collecting information relating to case costs in a beneficial way. Additionally we anticipate that at the end of the first year we will have all vendors submitting their bills online which will reduce the amount of work done manually entering claims into SABHRS. We also anticipate that by allowing all forms or pre-approval requests to be completed online we will increase the efficiency of the attorneys requesting services as they will no longer be required to track down the mental health coordinator, their Regional Deputy, or the Chief Public Defender for approval because everything will be electronic. – *Wendy Johnson*

3. What is our plan to grow the contract attorney pool?

In many areas of Montana, OPD is faced with a lack of private attorneys. A recent article in the University of Montana Law Review highlighted the problems Montana's citizens face in gaining access to legal services in rural Montana.¹ A lack of attorneys in these rural areas is one of the fundamental obstacles to providing legal representation. According to the article, approximately 81 % of Montana's active attorneys are located in the six most-populated judicial districts, based in Billings;² Missoula;³ Bozeman;⁴ Kalispell;⁵ Great Falls;⁶ and, Helena.⁷ Less than 20% of Montana's active attorneys serve the state's remaining 16 judicial

¹ See, Wandler, *Spreading Justice to Rural Montana: Rurality's Impacts on Supply and Demand for Legal Services in Montana*, 76 Mont. L. Rev. 225 (2015).

² (13th District, Yellowstone County)

³ (4th District, Missoula and Mineral Counties)

⁴ (8th District, Gallatin County)

⁵ (11th District, Flathead county)

⁶ (3rd District, Cascade County)

⁷ (1st District, Lewis & Clark and Broadwater Counties)

districts. OPD cannot expand the contract attorney pool in these areas unless attorneys live and practice there. Expanding the pool may require steps that are beyond OPD's current means.

One solution for the dearth of private attorneys in rural areas is to persuade attorneys to move to rural Montana and open offices in those regions. Incentives to offer attorneys may include the following:

- Differential pay. The Public Defender Commission could set a higher hourly rate for contract attorneys in specific areas in which OPD has a need.⁸ The hourly rate that would be sufficient to persuade more private attorneys to seek contract work with OPD is unknown at this time. For purposes of comparison, in a 2011 survey of members of the State Bar of Montana, 43% of attorneys who responded reported that an hourly rate was their primary source of income. Of these attorneys, 90% reported charging \$100 or more per hour as the typical rate.⁹
- Benefits. Attorneys may be persuaded to move to rural Montana and open offices if part of the compensation included provision of health care and/or other benefits.
- Loan forgiveness. Attorneys who are relatively new to private practice may be persuaded to move to rural Montana and open offices if part of the compensation includes some type of student loan forgiveness.
- Training/Mentoring. In the 2011 State Bar of Montana survey, 23% of the attorney members reported that they spent 20% or more of their time in the field of criminal law. OPD currently includes contract attorneys in "boot camp" training for newly admitted and/or inexperienced attorneys. OPD could consider including a training component by which attorneys who are willing to locate in rural Montana would receive "how to" instruction in substantive criminal law and procedure. –*Bill Hooks*

Additionally, OPD will continue with its current practice of reaching out personally to new attorneys as we learn individuals have moved to these rural regions. OPD will continue to encourage the use of associates in firms that currently provide services for our clients. –
Wendy Johnson

- 4. Consider using a different contractor rate to attract this resource to problem parts of the state. What is the federal rate and what is its process for using contractors? As part of the response, note that the agency's mode of operation is to keep the most costly/complex cases in house.**

⁸ The Commission determines appropriate compensation rates for contract attorneys. ARM 2.69.601.

⁹ State Bar of Montana Membership Survey (2011).

The current rate for Federal Defenders is \$125 per hour. OPD's current hourly rate for contract attorneys is \$62 per hour. The federal system is different from our system in several ways. Attorneys must be approved for the CJA (Criminal Justice Act) panel of attorneys by a selection committee. The number of attorneys is limited to 60 for the entire state, although this limit was just recently implemented and the panel is currently above said limit. Attorneys are also paid, not on a monthly basis, but only upon completion of the case. The federal system also has a soft-cap system, and anything over the cap is discretionary by the judge. Additionally, the courts review the bills. Similar to the state system, the federal system will have CJA attorneys cover conflict cases and occasionally overflow cases.

As was noted in Task Number 3 above, OPD has considered using a different contractor rate to attract attorneys in rural areas of the state. However, we have not implemented the use of differential rates for a number of reasons, including but not limited to; budgetary restrictions, logistical difficulties, and a lack of approval for such practice by either the legislature or the Public Defender Commission. One additional difficulty OPD is concerned about regarding different rates of pay, is the response we may receive from the contract attorney pool should different Regions be granted a higher rate of pay. Hypothetically, we could see attorneys in Missoula for example, refusing to work for OPD if they find that attorneys in Glendive make double what they make for the same work. It should be noted, the Office of the State Public Defender, as a matter of practice, keeps the most costly and complex matters in house which often means we are contracting out a high volume of misdemeanor cases to contract counsel. Unfortunately, some contract attorneys are not interested in misdemeanor work and would prefer to only work on the more challenging, higher cost felony type criminal work. It is also OPD's understanding that Montana is unique in the scope of our civil practice, which is certainly a difference worth noting between the federal and state systems.

****Please note it appears Dave Bohyer is also going to cover the Federal Defender system and that this appears to be on our list twice as #4 deals with this, as does #17.**

–Wendy Johnson

- 5. Provide FTE vs Contractor studies, including the one that we did not include in the FY 15 Governor's report that shows how we develop the base FTE and contractor rates, and allocate overheads based on assumptions to get to a "fully allocated rate." As part of our response consider providing an explanation as to why we use the combination of FTE and contractors to serve our client base as we do today, and why we need both. Provide our strategy and why it works.**

FTE vs. Contract Attorney Hourly Cost, [FY 14](#) and [FY 15](#)

Answer: why do we use the combination, and why do we need both?

In March, 2004, the Law and Justice Interim Committee voted unanimously to pursue development of a statewide public defender system managed and supervised by a state public defender office.¹⁰ The bill which established OPD included provisions for regional offices and for reliance on contracting for public defender services.¹¹

¹⁰ *For the Defense: Enacting a Statewide Public Defender System in Montana (2004)*, at p. 30.

¹¹ See, § 47-1-216, MCA, enacted in Sec. 12, Ch. 449, L. 2005.

Use of a combination of staff attorneys and contractors is consistent with the American Bar Association's *Ten Principles of a Public Defender Delivery System* (2002)(ABA Ten Principles). Principle 2 states that "[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar." The phrase "sufficiently high" "generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

In each of our eleven regions, there are enough cases in which OPD is ordered to appoint counsel to support full-time public defenders, and the remaining number of cases are enough to support meaningful involvement of private attorneys.

Contract attorneys provide a necessary resource (1) in those areas in which OPD does not have an adequate FTE presence; and (2) when the workloads of staff attorneys become excessive. For example, attorneys serving in rural areas must manage court dockets and hearings in multiple locations. Some types of cases require prompt attention, such as involuntary commitment proceedings. Staff attorneys simply cannot cover all courts and fulfil other obligations to clients. Contract attorneys also provide a necessary option (3) in those cases in which staff attorneys have a conflict of interest which disqualifies them from involvement in a particular case.

In sum, contract attorneys enable the State, through OPD, to fulfill its constitutional obligation to provide counsel to those who are entitled to legal representation at public expense. —*Bill Hooks*

6. Break out our five year cost per case type average by year.
7. Provide our legislation to remove jail time and our fiscal note.
[SB 90](#)
8. **Provide an explanation for growth in inactive cases. Check to assure that inactive cases are removed from the case durations and are not affecting the numbers. Explain the policy change that increased the number of inactive cases.**
OPD is required to report for each fiscal year the number of cases that remain open but are inactive.¹² The number of cases that we report as "inactive" has increased over time due to a change in our internal policies intended to provide OPD management with more accurate assessment of pending cases. The change primarily affects criminal cases in which a deferred sentence is imposed following conviction for a crime. Under Montana law, an offender may move the court to strike a conviction and order a case dismissed after termination of a defined period of time remaining on a deferred sentence. These cases thus may require additional work by the attorney to facilitate the dismissal of the charge upon the expiration of the time period.

¹² Sec. 47-1-201(10)(a), MCA.

During the interim while these cases are open but require no further work by the attorney, these cases are moved from “open and active” to “open and inactive.”

Inactive cases are not included in the calculations of case durations. –*Bill Hooks*

9. What changes would the Commission and/or the agency offer for improvements to the agency? What is the impact of the change on the budget? Are there pilot projects that could reduce caseloads? Holistic Defense? Can the Commission offer changes to statutes to make the agency better?

Answer: the notion that “improvements” can be made needs some definition – performance? Timeliness of representation? Outcomes? Cheaper representation?

Two proposals I made to the Governor’s DN Task Force:

- Amend 41-3-425 to provide that a parent who cannot be found or who is unknown is not entitled to a public defender.
- Amend Title 42 to permit “open adoptions” in DN cases. Parental rights would be terminated, but the biological parent would still have some opportunity to remain in the child’s life.

Other ideas:

- The HB 612 DN pilot project was promoted as having the potential to reduce DN litigation; so far it has not produced meaningful data, so no reliance can be placed on this option at this time. Voluntary mediation or dispute resolution in DN cases might be beneficial.
- Removing jail time from certain offenses such as Driving While Suspended/No Insurance in non-DUI cases.
- De-criminalizing non-violent, “victimless” crimes and making these civil violations.
- Meaningful pilot projects intended to keep people from entering the court system and becoming our clients:
 - Treatment court models that provide meaningful benefit by diverting participants’ consequences of criminal convictions and collateral consequences; conversely, limiting our involvement in certain treatment court models.
 - Signing up clients for Medicaid benefits.
 - Early-intervention programs for youth, to head off incidents which will lead to Youth Court proceedings. Specialized training for law enforcement officers in dealing with kids with disabilities, so issues can be addressed without referring the kid to the youth court system.
- Meaningful pilot projects intended to keep people from re-entering the court system and becoming our clients in repeat offender or revocation proceedings.
- ***OPD is reactive. We get involved after some other actor has initiated a court action. We are limited in our ability to take action on the front end, when timely involvement might lead to more timely resolution or head off problems. If and when we do try to get involved early on, we can be challenged for adding unnecessary work to our already***

overtaxed resources. A number of the steps that can be taken to help OPD reduce its caseload lie beyond our ability to bring them about. – Bill Hooks

10. More fully explain our proficiency determination policy and process.

As has been noted previously, the OPD Contract Manager, with assistance from other OPD managers and the OPD Conflict Coordinator, puts together proficiency determination packets bi-annually for each contract attorney in the contract attorney pool. These packets include a variety of information from a variety of sources and will in the future also track adherence to OPD Standards. (Please see the answer provided for Question 14.) OPD has attempted to receive feedback from a variety of sources including court personnel and Judges. Our agency has historically solicited this feedback by reaching out via telephone and email. This approach has not been well received. As such, OPD has contacted several judges in various judicial districts to solicit feedback or suggestions regarding how to make this process easier and more successful. As a result of the contacts that were made, OPD has plans to develop a short online survey that will be distributed to Judges to request feedback regarding the contract attorneys that are appearing in their courts. It is anticipated each survey will be brief, between 5 and 10 questions, and will also provide the Judge with the opportunity to provide comments. One of the judges who was contacted has graciously agreed to review the survey prior to its distribution. Although OPD has had better success in contacting court staff by telephone and email, OPD will like move to an online survey for their feedback as well as it gives the recipient of the survey more time to formulate a response which will lead to more meaningful feedback.

It should be noted at this time that, while OPD will certainly engage in communications with prosecutors and law enforcement, feedback from prosecutors and law enforcement will not routinely be solicited for purposes of the proficiency determinations. One reason for this is the feedback we may receive may not be impartial, simply because of the nature of the work we do working in an adversarial system. However, it should be noted that OPD certainly considers all complaints or comments we receive from all sources, and as an agency OPD is willing to engage in a dialogue with any source that can help us do a better job for our clients.

OPD treats the information we receive and compile in the Proficiency Determination packets as confidential. As such, while we notify managers of the final determination, in general we keep all information private and do not distribute this information to members of the public. OPD intends to continue this practice as our agency does not intend to infringe on the privacy rights of our contract attorney pool. – Wendy Johnson

11. Provide salary surveys.

[Policy 540, Broadband Pay](#)

[2014 Market Spreadsheet](#)

[EPP Personal Services Narrative](#)

[2014 Market Analysis Process](#)

[2014 Attorney Salary Survey](#)

12. This may not be for the Task Force but for us: Provide FTE and dollars of county attorney operations for criminal prosecution. Include the AG's office, both trial and appellate. Contact MACO and Montana League of Cities and Towns.

13. Identify a communication plan, and what commissions/councils/committees we serve on and the value they bring to our mission. Identify our stakeholders and how our actions affect them.

14. Add a section to track adherence to the Standards to our proficiency determinations and staff attorney evaluations.

This would be hard to do. Our staff attorney performance evaluation process encompasses the concept that attorneys should adhere to the PDC Standards.

The Standards themselves are aspirational in nature. The standards “are intended to be used as a guide to professional conduct and performance.” A particular Standard may not apply based on the specific nature or facts of a given case.

The Standards are designed to foster a legal representation system in which “[c]ounsel’s workload matches counsel’s capability[.]” As standards relating to workload limits provide, “[n]ot even the most able and industrious lawyers can provide effective representation when their work loads are unmanageable.” In many instances, however, one’s workload exceeds the capability to keep up. Systemic challenges based on excessive workloads undermine the ability to adhere to the Standards. –*Bill Hooks*

OPD will begin tracking adherence to the Standards as part of the proficiency determination process by first identifying the core standards we believe are most critical. This will not only require a thorough review of the Standards themselves, but will also give us the opportunity to review and revise the Standards if we feel such revisions are necessary. Following a selection of core Standards, OPD will audit cases completed by each contract attorney by closely reviewing the detailed invoices provided by the contract attorney for each case. We will conduct the audit by preparing a checklist which includes the Standards so as to confirm compliance. For example, if the Standard we are looking at relates to initial client contact, we will confirm via the contract attorney’s billing records, when the date of first contact occurred. If there is a discrepancy in the billing records, or it appears the Standards have not been met in an isolated incident, OPD will contact the contract attorney for additional information or to schedule a meeting to discuss the deficiency. If it appears the contract attorney is routinely neglecting to adhere to OPD Standards, prior to meeting with the contract attorney, the contract manager will meet with other relevant managers to discuss OPD’s relationship with the attorney and how best to proceed. –*Wendy Johnson*

15. Survey contract attorneys as to why they left our service.

Contractors terminate their MOUs with OPD for a variety of reasons, including accepting full-time employment with OPD or the prosecution, the low hourly rate of pay, or too much work in their private practice. We can provide a list of people who are no longer taking OPD work upon request. –*Wendy Johnson*

16. What is [agency turnover by year](#)? And why did it happen?

17. Provide a description as to how the federal defender system works and how we are the same and where we differ.

18. Eligibility requirements: how does it work and what are some suggestions to improve it? Re-issue RFP to see if someone in the market will provide this function in a cost-effective manner. Should the agency ask that the courts take back this function – what are the benefits? Research what other states do in this area.

HOW DOES IT WORK, HOW CAN IT BE IMPROVED?

State and federal constitutional provisions guarantee the right to assistance of an attorney, and the right to have counsel appointed if the person cannot afford to retain an attorney. Prior to the establishment of a statewide public defender agency, Montana courts lacked any standard definition of indigence. Each court could use a different standard to determine if a person was eligible for a public defender.¹³ The 2005 Legislature set financial standards to determine a person's financial eligibility, and directed OPD to make the eligibility determination.

The first step is to screen those applicants who must, by statute, be deemed eligible for services. Effective screening promotes reliable and accurate eligibility determinations and ensures compliance with the constitutional right to counsel. Ineffective screening results in unreliable and inaccurate determinations. If the screening process is under-inclusive, OPD runs the risk of infringing on the right to counsel. If the screening is over-inclusive, persons who have the ability to retain counsel may be provided with appointed counsel, and this may strain OPD resources.

OPD screens applicants by requiring that an application be completed. The application is reviewed internally for completeness. If no application is received, or if an application or supporting documentation is incomplete, OPD internal policy directs the regional supervisor to move to rescind the order of appointment.

The information provided in the application forms the basis for the eligibility determination, made by the regional deputy public defender. A person may be deemed eligible if he or she meets legislatively-enacted standards based on Federal Poverty Guidelines and on substantial hardship.

If the applicant is deemed ineligible in the screening process, or if subsequent information leads to the conclusion a client is ineligible, OPD will ask the court to rescind the order of appointment and relieve OPD of the obligation to provide an attorney.

From the perspective of resource demands, the process could be improved by relieving OPD of the responsibility for conducting the screening and eligibility determination functions.

OPD managers also are examining ways in which we can develop a centralized eligibility determination function, and relieve our regional staff from responsibility for much of the eligibility processes. The screening process would continue, and our regional staff would be able to focus more of their time on case and office-related tasks. –*Bill Hooks*

¹³ *For the Defense: Enacting a Statewide Public Defender System in Montana (2004)*, at p. 18.

19. Develop a plan to communicate our successes.

20. Are there improvements the agency could make in the non-legal area, such as within central services, to make the agency more efficient? Are there information technology projects, etc.?

One of the difficulties OPD faces with relation to the contract program is simply having the time to conduct proficiency determinations for the entire pool of contract attorneys. A solution to this problem may be legislation allowing OPD to only conduct a proficiency determination for contract attorneys who handle a certain number of cases. This would allow OPD to look only at the contract attorneys who are handling the bulk of the work, instead of spending a lot of time looking at attorneys who only take a handful of cases each year. –

Wendy Johnson

21. State special revenue issues – make this part of our submission to the Task Force. Also consider an RFP.

22. What can the Task Force do for us? Explore the concept of providing legislation to allow OPD to stop taking cases based on some metric or trigger. Give the agency some level of control of the demand for its services.

cc: Bill Hooks
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Peter Ohman
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